FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 14 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 870

GORDON KIYOSHI HIRABAYASHI, *Appellant,*

against

UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S REPLY BRIEF

FRANK L. WALTERS,
HAROLD EVANS,
OSMOND K. FRAENKEL,
Counsel for Appellant.

ARTHUR G. BARNETT,
of Seattle, Wash.

EDWIN M. BORCHARD,
of New Haven, Conn.

HAROLD EVANS,
of Philadelphia, Pa.

BRIEN MCMAHON,
of Washington, D. C.

OSMOND K. FRAENKEL,
of New York, N. Y.

WILLIAM DRAPER LEWIS,
of Philadelphia, Pa.

FRANK L. WALTERS,
of Seattle, Wash.

of Counsel.

INDEX

PAGE

1. The orders were not authorized by the statute 4
2. The war power of Congress does not support the orders 5
3. The war power of the President does not support the orders 7
4. With regard to racial discrimination 10
5. The question of hearings 11
6. With regard to delegation 14
7. The question of vagueness 19
8. Appellant has standing to raise the constitutional issues 20

CONCLUSION 21

APPENDIX 25

San Francisco News 25

Excerpts from Ex parte Milligan 26

CASES CITED

	PAGE
Brooks v. Dewar, 313 U. S. 354	5
Brown v. United States, 8 Cranch 110	8
Buchanan v. Warley, 245 U. S. 69	3
Clarke v. Deckebach, 274 U. S. 392	10
Curtiss-Wright Case, 299 U. S. 304	15
Dakota Cent. Tel. Co. v. South Dakota, 250 U. S. 163	16
Ex parte Marais (1902), A. C. 109	7
Ex parte Milligan, 4 Wall. 2	7
Ex parte Quirin, 317 U. S. 1	22
Gong Lum v. Rice, 275 U. S. 78	10
Greene v. Secretary (1942), 1 A. C. 284	6
Highland v. Russell Car Co., 279 U. S. 253	16
Isbrandtsen-Moller Co. v. United States, 300 U. S. 139	5
Jacob Ruppert v. Caffey, 251 U. S. 264	12
The King v. Allen (1921), 2 Ir. R. 241	7
The King (Garde) v. Strickland (1921), 2 Ir. 317	7
The King (Ronayne) v. Strickland (1921), 2 Ir. 333	7
Liversidge v. Anderson (1942), 1 A. C. 206	6, 14
Lockington v. Smith, 1 Pet. C. C. 466, Fed. Cas. No. 8448	6
Lockington's Case, Brightly N. P. (Pa.) 269	6
McKinley v. United States, 249 U. S. 397	16
Mitchell v. Harmony, 13 How. 115	21
Northern Pacific Co. v. North Dakota, 250 U. S. 135	16
Patsone v. Pennsylvania, 232 U. S. 138	10
Plessy v. Ferguson, 163 U. S. 537	10

PAGE

The Prize Cases, 2 Black 635 ____ 8

Respublica v. Sparhawk, 1 Dallas 357 ____ 6

Ronnefeldt v. Phillips, 35 T. L. R. 46 ____ 6

Terrace v. Thompson, 263 U. S. 197 ____ 9

United States v. Cohen Grocery Co., 255 U. S. 81 ____ 17

United States v. Grimaud, 220 U. S. 506 ____ 15

United States v. Meyer, 48 F. Supp. 926 ____ 13

United States v. Stafoff, 260 U. S. 477 ____ 5

United States v. Wezel, 49 F. Supp. 16 ____ 13

Viereck v. United States, 318 U. S. ____ 5

STATUTES, ETC.

Act of March 21, 1942 ____ 2, 5, 8, 15, 16

Act of July 25, 1942 ____ 4

Constitution of the United States:

Art. I §9 ____ 5

Art. II §2 ____ 8

Exclusion Order No. 57 ____ 2

Executive Order No. 9066 ____ 4, 17, 18

Public Proclamation No. 3 ____ 2, 19

Public Proclamation No. 7 ____ 2

S. 2293, 77th Congress, 2d Session; Senate Report, 1496 ____ 15

Tolan Report, House Document, 2124 at p. 230 ____ 4

50 U. S. C. A. 21 ____ 8

50 U. S. C. A. App. 310 ____ 5

50 U. S. C. A. App. 921 ____ 5

TEXTS

Berdahl, War Powers of the Executive in the United States ____ 9

Carr, Regulated Liberty, 42 Col. L. Rev., 399, 346 ____ 6

McWilliams, Brothers Under the Skin ____ 1

San Francisco News, April 13, 1943 ____ 1

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

The government (pp. 10-32) asks this Court to take judicial notice of a mass of material as justification for the issuance of the military orders. Most of this material, however, consists merely of opinions held by various persons—much of it, indeed, mere suspicion. However, equally strong contrary views have been widely expressed.[1] Even the facts related in the brief are of doubtful relevance, since they form only a partial picture of the situation. Nothing in the record indicates what facts were considered by the military authorities.[2] Indeed, the record is wholly barren of evidence in justification of the

---

[1] The subject is fully treated in the brief filed herein by Japanese-American Citizens League, *amicus curiae*. See also McWilliams, *Brothers Under the Skin* (1943).

[2] Indeed, recent testimony by General DeWitt indicates that prejudice dominated his thinking. He opposed a proposal that some Japanese be returned to the West Coast and said, "A Jap's a Jap, it makes no difference whether he is an American citizen or not" (see *San Francisco News*, April 13, 1943, p. 1). We print the relevant portion in an appendix, page 25, *infra*.

orders. And the orders themselves make no explanation of the reason for singling out citizens of Japanese ancestry beyond the bare statement of conclusion that there was military necessity (see Proclamations Nos. 3 and 7, main brief, pp. 27, 29). The exclusion order itself (No. 57, main brief, p. 31) does not even give that reason.

Under the circumstances, we submit the elaborate structure erected by the government rests on sand. For it lacks the necessary foundation of legislative declaration that the proposed action is in the public interest. Without such declaration there is no ground for any presumption of regularity. The presumption of constitutionality attaches only to statutes, not to executive or military orders. Any person seeking to interfere with the liberty of the citizen must justify his acts by proof that there was substantial reason for doing so. Here no such proof was attempted. If it be argued that the Act of March 21st constituted such a legislative declaration, the answer is, as we will elaborate hereafter, that it cannot be so construed as to contemplate the singling out of Japanese citizens, and that the law is invalid on various grounds.

The government lists certain factors which it says justify the discrimination against Japanese: That they bear resentment against earlier acts of discrimination and have not been assimilated (pp. 20, 21), that many of them hold dual citizenship (pp. 24, 25), that a considerable number of them are Shintoists and revere the Emperor of Japan as a deity (pp. 26-28), that some of their children have been educated in Japan (pp. 28, 29), and that Japanese language schools were maintained on the west coast (pp. 30, 37). The exhaustive brief of the Japanese American Citizens League as *amicus curiae* has discussed these various contentions and has shown that they either rest on pure conjecture or are without relevance. Moreover, every one of these factors exists also with regard to other foreign groups in this country, especially the Italians and the Germans.

The sum and substance of the government's argument, however, is that because some small unidentified number of Japanese may be dangerous, it was proper to take action against them all. That, we submit, is a position without merit. For here action was not taken against any group which itself might have the elements which are considered dangerous—the action was not taken, for instance, against Shintoists, or against Japanese of dual citizenship, or against persons educated in Japan. It was taken not against individuals who might be objectionable, but against a class, which the government admits was as a whole loyal (pp. 34, 36).

The government also suggests (pp. 31, 32, 46) that the possibility of civil disorder against Japanese was justification for the orders. On this subject we quote Mr. Justice Day, in *Buchanan* v. *Warley*, 245 U. S. 69, 81:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."

In discussing the military situation (pp. 12-15) the government ignores altogether the enormous distances involved. Thus San Francisco is 2,400 miles from Honolulu and Midway is 1,300 miles further. And from Seattle to Attu is 2,600 miles. It was suggested during the argument that these distances are unimportant on account of the aeroplane. But invasion cannot be accomplished from the air alone. If the Germans were unable to accomplish this across the narrow English Channel there was no reasonable basis for believing that Japan could invade our coast by air across the wide Pacific Ocean.

And in referring to the war industries on the West Coast (pp. 17, 18) the government proves too much. For surely the Germans and Italians were as concerned as the Japanese to damage these. Yet nothing was done to disturb

the very large Italian and German born populations on the West Coast (see Tolan Report, House Document, 2124 at p. 230).

1. The Orders Were Not Authorized by the Statute

The government (pp. 37-42) argues that the orders were authorized by the statute primarily because the purpose of the statute was to confirm the President's Executive Order No. 9066. It should be noted, however, that that order itself did not authorize discrimination against the Japanese as a group, it did not suggest that entire counties and cities would be declared military areas; it did not authorize removal without any hearings. Consequently, nothing can be read into the Act of Congress more than was in the President's Executive Order.

The comments from Representative Costello and Senator Reynolds quoted in the government's brief (notes 60, 61, p. 40), do not support the government's argument. There is nothing in these statements to indicate that wholesale evacuation of Japanese was contemplated. On the contrary, the implication was that only "certain individuals" would be barred, presumably because these were considered dangerous.

The government finally contends (p. 42) that even if the statute did not authorize what was done by the military authorities, Congress ratified what was done by appropriating money for the War Relocation Authority (56 Stat. 704, adopted July 25, 1942). We submit that no such inference can be drawn from the appropriation and moreover, that it would be unconstitutional to do so in this case. Surely it is stretching the doctrine of ratification very far to suppose that the provision of money to take care of the evacuated Japanese, helpless wards of the government, both aliens and citizens, is to be construed as approval of what had been done by the Army with regard to citizens. In any case, ratification can never be invoked in aid of a

criminal prosecution for an act committed prior to the ratification. That would be a violation of the prohibition against *ex post facto* laws (Const., Art. I, sect. 9). See *United States* v. *Stafoff*, 260 U. S. 477; *Viereck* v. *United States*, 318 U. S. . There can be no question but that the prohibition applies in this case, for the wrongful acts charged in the indictment occurred in May, 1942 (R. 2) and the supposed ratification did not take place until July 25, 1942. The cases cited by the government (*Brooks* v. *Dewar*, 313 U. S. 354; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139) are wholly inapplicable: these were suits to restrain official action brought after the ratification had occurred.

We submit, therefore, that there is no justification for the government's contention that the Act was either authorization or ratification of what was done.

2. The War Power of Congress Does Not Support the Orders

If it be held that the Act of March 21, 1942, gave the President authority to issue the orders in question, we submit it was beyond the power of Congress to vest the military authorities with this control over civilians.

Even if it be assumed that the emergency of war might justify the evacuation of a particular racial group from so many communities, either because of the group's potential danger to the war effort, or because of hostility to the group on the part of the remaining population, we submit that there is no constitutional warrant for the use of military power to accomplish the objective. It is wholly fallacious to suppose that the war power and military power are correlative. Congress, indeed, has vested the President with vast powers in connection with the conduct of the war, but it has placed these in civilian hands. Such was the nature of Congressional action in connection with the draft (50 U. S. C. A. App. 310) and the fixing of prices (50 U. S. C. A. App. 921).

This is no idle matter of form. It is the essence of a free country that civil power be dominant. And this should be so even during a war.

None of the American cases cited by the government [3] (p. 50) indicates otherwise. Certainly, there is no similarity between what was done here and the acts approved in the cases cited. The *Lockington* cases involved only enemy aliens; the *Sparhawk* case the removal of property to prevent its falling into enemy hands.

As to the English cases [4] cited on pages 50, 51, there is no basis for any analogy. England has no written constitution, its courts recognize no right to pass on the validity of Acts of Parliament. Therefore, once Parliament has spoken, the only question for the courts is the construction of the law. It should be pointed out, moreover, that England has authorized no mass evacuation, such as was ordered on the West Coast; that there has been no discrimination based on race; that during the present war civilians alone have the power to order evacuation, and that each person ordered evacuated is given a hearing before an advisory committee, at which the grounds of the action taken against him must be stated to him. The regulations quoted in the government's brief (note 67, pp. 50, 51) deal only with evacuation in connection with anticipated military actions. The regulations which authorize evacuation of persons considered dangerous are set out in the *Liversidge* case [1942] 1 A. C. 206 (see also Carr, Regulated Liberty, 42 Col. Law Rev., 399, 346).

The government points out (pp. 42-44) that no question of martial law is here involved. With this we agree. But we do not agree with the inference which the government seeks to draw. On the contrary, we contend that in the

---

[3] *Lockington* v. *Smith*, 1 Pet. C. C. 466, Fed. Cas. No. 8448; *Lockington's Case*, Brightly N. P. (Pa.) 269; *Respublica* v. *Sparhawk*, 1 Dallas 357.

[4] *Ronnefeldt* v. *Phillips*, 35 T. L. R. 46; *Liversidge* v. *Anderson* [1942], 1 A. C. 206; *Greene* v. *Secretary* [1942], 1 A. C. 284.

absence of martial law what was here done was beyond the constitutional power of the government.

It is suggested (p. 43) that this Court need not consider the extent to which the *Milligan* case controls. But the government ignores altogether the definition of the limitations of military power which was apparently accepted by all of the judges in that case and which we quoted in our main brief (pp. 11 and 12).

Certainly, the government can draw no support from the English cases. The statement in its brief (note 62, p. 43) that the English and Irish courts no longer follow the *Milligan* case is not correct, and the cases cited [5] do not so hold. While it is true that these courts have held that martial law might properly be declared, although, for some purposes, the ordinary courts were open, they all agree with the decision of the majority in the *Milligan* case that actual warfare or disorder is an essential accompaniment of martial law, and that the courts will determine whether the facts justify the declaration of martial law. (For the convenience of the Court we print excerpts from that decision in the Appendix, pp. 26, 27, *infra*.)

We submit, therefore, that the power here exercised by military authority is entirely outside the proper function of the military, and that if Congress has any constitutional right to decree evacuation, it could not entrust the army with such power, but was required to place it in civilian hands. The problem was essentially a civilian, not a military one.

3. The War Power of the President Does Not Support the Orders

The government argues (pp. 52-56) that the President had power to authorize the military orders even without

---

[5] *Ex parte Marais* [1902], A. C. 109; *The King* v. *Allen* [1921], 2 Ir. R. 241; *The King (Garde)* v. *Strickland* [1921], 2 Ir. 317; *The King (Roncyne)* v. *Strickland* [1921], 2 Ir. 333.

Congressional approval because of the war powers granted him by the Constitution. The only powers granted are those of Commander in Chief (Const., Art. II, §2). We submit that these powers have never been construed so as to give the President the right to control either persons or property within the United States. This Court expressly so ruled with regard to an attempt to seize British owned property during the War of 1812. In *Brown* v. *United States*, 8 Cranch 110, Chief Justice Marshall pointed out that the President's powers with regard to persons and property were correlative, that Congress had given him the right to detain alien enemies, but not the right to seize their property. The omission was considered decisive. So the Court held the seizure of the property beyond the war power of the President. And since Congress has given the President the power to detain aliens (50 U. S. C. A. 21), but not citizens (unless the Act of March 21, 1942, be construed so as to grant such power), it follows by like reasoning that the power of the President does not extend to the orders here under review.

The only case cited by the government which upholds Presidential power unaided by Congressional authorization is *The Prize Cases*, 2 Black 635. But the situation there presented is wholly unlike that in the case at bar. There the President was dealing with persons and property in enemy territory, not with citizens peacefully residing in their homes.

Appellant does not dispute the right of the President to order the military authorities to take over any particular place which is necessary for defense purposes and to exclude civilians from such a place. Today there are anti-aircraft and other guns at strategic points, there are military encampments in various parts of the country. Over these the military necessarily and properly have full control. And in anticipation of actual invasion the army could no doubt take over any place it thought necessary for the disposition of its forces. But when banning people from true military areas, or even when evacuating the civilian

population from other areas in time of actual military operations, the army would be acting on considerations quite different from those here involved. For here the military assumed the power to act with regard to immense stretches of country, including whole cities, such as San Francisco, Los Angeles, Seattle and Portland, and acted in the absence of any actual warfare and without regard to the disposition of military personnel.

The right to interfere with civilian life to the extent here directed is not given to the President by the Constitution. It forms no part of his function as Commander-in-Chief. None of the authorities cited by the government hold otherwise. It is significant, for instance, that Mr. Berdahl, in his book, "War Powers of the Executive in the United States" (cited by the government, p. 54), nowhere suggests that the powers of the President as Commander-in-Chief extend to the removal of citizens. In Chapter 9 (pp. 152 ff.), he discusses military government, but makes clear that this deals only with occupied territory. The only situation in which the executive authority may be exercised over citizens is where martial law has been declared, but that, says Mr. Berdahl, requires a formal proclamation. And of course, there was none here. In discussing the President's power of police control, which Mr. Berdahl considers to be a civil, not a military, function of the Presidential war power (Chapter 11, pp. 183 ff.), he recognizes that the power of the President over persons is derived only from Congressional authorization. Moreover, he expresses grave doubt of the power of the President to deal with citizens at all in the absence of a suspension of the writ of habeas corpus (p. 188). The most that he concedes is that when Congress is not in session the President may have power to act in an emergency (p. 192). Here, of course, Congress was continuously in session, and the writ of habeas corpus has not been suspended.

We submit, therefore, that the war powers of the President form no justification for what was done.

4. With Regard to Racial Discrimination

The government claims that there was a rational basis for the discrimination against citizens of Japanese ancestry, but it can find no cases supporting that contention. The cases which deal with generalizations about classification (p. 57) all rest on the proposition that the Legislature may make a reasonable classification. Here Congress has made no classification whatever. The cases which uphold restrictions against aliens[6] are not helpful, for the case of the alien is always different. This was expressly recognized in the *Clarke* case cited by the government (p. 60). Moreover, we are not here concerned with action directed against aliens. Finally, the government cites cases[7] which uphold segregation between races. We suggest that these cases should not be given new life by this Court at this time. They rest on the proposition that where there is equality of treatment between persons of different races mere separation is not unconstitutional. This is not the place to point out how unrealistic was the attitude which permitted a race which considered itself to be dominant to treat another race as inferior by segregating it. But at least the supposition in those cases was that equality of treatment actually occurred. No one can argue here that there was any equality of treatment in connection with the curfew and exclusion orders. All groups except the Japanese were allowed to remain in their homes and follow their occupations. Japanese alone were removed to camps as a group. This is segregation, but it surely is not equality.

The government evidently recognizes the fact that the cases it cites do not support its position. It seems to sug-

---

[6] *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Clarke* v. *Deckebach*, 274 U. S. 392; *Terrace* v. *Thompson*, 263 U. S. 197, and its companion cases.

[7] *Plessy* v. *Ferguson*, 163 U. S. 537; *Gong Lum* v. *Rice*, 275 U. S. 78.

gest, however, that the action taken was not on the basis of race (p. 35, and footnote 70 on p. 59). In so far as the action was directed also against others than Japanese, it was directed against them either because they were aliens or because of objections to particular individuals. No citizens were involved as a class other than the Japanese. Consequently, the orders, in so far as they were directed against American citizens of Japanese ancestry were directed against them solely on account of their race, and were directed at no other groups on like grounds.

The suggestion (p. 35) that the government did not act on the basis of race, but on the existence within the group of persons who were a "threat to the security of the nation" is remarkable indeed, for these orders were not directed only at persons who were such a threat, and the basis of the supposed threat was solely the race of the persons involved. It appears, therefore, that the orders were based solely on race and were lacking in justification.

5. The Question of Hearings

The government argues (pp. 62 ff.) that hearings were impracticable both because of the time they would take and the impossibility of ascertaining the facts. And it also contends (pp. 63, 64) that there was no legal need for hearings since there was no factor involved about which a hearing could be held. We shall first consider this argument, since the other points in a measure depend on this one.

The basis of the argument is that the removal was not motivated by the possible disloyalty of the citizens of Japanese ancestry, but that the reason for the evacuation was the danger of their continued presence on the West Coast (pp. 63, 64). But when we look to other portions of the government's brief to see how the existence of such a danger is justified we find the chief point to be the possible disloyalty of some of these citizens (pp. 20-28, 34, 46).

Stress is laid on their family ties, on their religion, on Japanese propaganda, on the danger which might exist in case of invasion because of acts of sabotage and espionage that might be committed by some of these citizens. Indeed, both the President's Executive order and the various military proclamations stress this last mentioned danger. So if the danger rests on disloyalty it is disloyalty that is the determining factor. Just so, in the sterilization cases (see main brief, p. 21) there was danger to the community from breeding by certain groups, but that danger depended on the transmissibility of factors tending to crime or imbecility. Therefore, any individual affected must have the right to show that in his case the factor did not exist which might produce the danger. Likewise, here each citizen affected should have the right to show that there was no basis in fact for the apprehension of danger, that he was not disloyal.

The government also argues (p. 63) that since the class as a whole was a proper object of action, individual hearings are irrelevant. That is not the holding of this Court in the sterilization cases we have just referred to. Nor does *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, justify the argument. Here we are not dealing with an isolated, innocuous person found in a group overwhelmingly harmful. On the contrary, even the government admits the majority of the Japanese are loyal (pp. 34, 46). The argument has been turned upside down. The government claims that because certain individuals may be harmful the entire group must suffer. That is not American law.

But it is said (p. 62) that there was a pressing emergency, and that such hearings would take too long. It is not, however, to be supposed that everyone affected by these orders would have claimed the right to a hearing. It is obvious that this evacuation was caused in large part by prejudice against the Japanese: that the Japanese realized that this prejudice existed, and that perhaps a large number of those evacuated were satisfied to be taken

care of by the government during the war period. But constitutional rights are not dependent on the will of the majority, not even on the will of the majority of those affected by any action of the government. They exist for the protection of each individual; they constitute in that regard the great glory of our system of government. Therefore, no argument of difficulty justifies the utter denial of hearings. And since the machinery which was established made no provision for any hearings, it is void.

Then the government argues (pp. 62, 63) that no hearing could determine whether a given individual was loyal or not. That is an argument that no representative of the Department of Justice should make. For all justice rests on the assumption that inquiry may develop the truth. Of course, in a given case, it may not do so. Injustices result on both sides of the picture: the guilty are let go, the innocent may be detained. But those are the risks inherent in a democratic society that prides itself on having a system for the administration of justice in which reason, not passion or prejudice prevails. Besides, the government has used hearings of the kind here suggested in almost identical situations, and apparently with great success. The government has brought many suits to cancel naturalization on the ground that naturalized Germans retained allegiance to their native land (see *United States* v. *Wezel*, 49 F. Supp. 16; *United States* v. *Meyer*, 48 F. Supp. 926). In dealing with enemy aliens, as to whom the government has plenary powers, the Department of Justice has set up boards in various parts of the country. All aliens of German or Italian nationality about whom there was any ground for suspicion have passed before these boards. Only those found to be dangerous have been interned. The others are at large. If this was done with the hundreds of thousands of these enemy aliens it could certainly have been done with the relatively few thousand citizens of Japanese ancestry who would have asked for the right to a hearing. It must not be forgotten that the Department of Justice had no doubt thoroughly

investigated all suspected Japanese long before Pearl Harbor and was continuously engaged in that process.

The government closes its discussion of this part of the case with a quotation from Lord Macmillan (*Liversidge* v. *Anderson* [1942], 1 A. C. 206, 257) to the effect that since in war people can be drafted, and therefore perhaps lose their lives, there is no limitation on the power of the government to do less. That may be good law in England, where there is no written constitution. Certainly, it is not good law in the United States. Moreover, the fact that a man of military age may be drafted under regulations which give due regard to his situation in life, and set up machinery for review, is not justification for military orders interning men, women and children of all ages simply because of their race, and with no possibility of review.

6. With Regard to Delegation

The argument of the government is that there was no delegation because the main lines of the intended action were known at the time the law was passed (p. 66), and that delegation in aid of the war power is free from constitutional restriction (p. 67).

The first of these points is indeed remarkable. Let us consider its implications. The legislative power was vested by the Constitution in the Congress in the evident belief that there would be public deliberation on all matters considered by that body. Such deliberation, moreover, would be followed by a vote which normally would record the position of the members, and it might be preceded by hearings in which the public could present its views. In other words, the legislative process involves consideration of the issues, or at least makes such consideration possible. Therefore, if the country was to embark on so revolutionary a proceeding as the evacuation and detention of a particular group of its citizens, the orderly constitutional process would be the introduction into the Congress of a bill pro-

viding precisely for such evacuation and detention and setting up machinery for their accomplishment.[8] Then the public and the members of Congress could have debated the issue, even in the emergency of war. But to say that this legislative process was carried out through the short cut of a blank check is utterly to misconceive the nature of the problem.

The further argument that war permits delegation unthinkable in time of peace is without support in any authorities. The *Curtiss-Wright* case, 299 U. S. 304, so heavily relied on (p. 69), does not support that conclusion. There this Court pointed to the fact that the President's power in foreign affairs existed independent of the Constitution and recognized the force of a long line of laws granting him wide discretion in that field. But the war power derives directly from the Constitution, and is there divided between the President and the Congress. It is the latter body that is charged with the enacting of laws to carry on the war; the President is merely made Commander-in-Chief of the armed forces.

There is every reason to suppose, therefore, that in this field of legislation, as in any other, Congress must define the general policy it desires to accomplish and set standards, while free to leave to administrators wide discretion in filling in the details. And that has not been done here. For the Act of March 21, 1942, lays down no real policies at all. True, it appears to authorize the exclusion of citizens from military areas. If the orders had been confined to the exclusion of citizens from forts and other such places there could be no complaint (Cf. *United States v. Grimaud*, 220 U. S. 506). But the military have assumed that the law gave them much greater power than that, indeed the power to legislate concerning the liberty of motion of citizens in large areas that are military only by fiat, in

[8] In fact, such a bill was introduced, but not acted on. S. 2293, 77th Congress, 2d Session; see Senate Report, 1496.

which nothing but civilian affairs are transacted. Moreover, the military have assumed the right to make distinctions between groups of citizens. That is legislation for which no express warrant appears in the law. Either it was unauthorized by the law, or the law is void as an improper delegation.

There is nothing in the first World War transportation and telephone cases [9] (pp. 67, 68) which justifies what was done here. There Congress authorized the President to take over certain business in cases of war. This constituted no delegation of legislative power, but merely administrative power to fix rates. The only question was whether Congress had authorized the fixing of intrastate as well as interstate rates.

Nor is *Highland* v. *Russell Car Co.*, 279 U. S. 253 (p. 69) at all pertinent. That case dealt with the fixing of prices by administrative machinery, a field particularly suited to executive action. No policies were laid down by the Executive. The government (p. 69) relies also on *McKinley* v. *United States*, 249 U. S. 397. There the Secretary of War was authorized to prohibit houses of prostitution near army camps. The only question was the degree of proximity, which he fixed at five miles. There was no attempt on the part of Congress to authorize the Secretary to declare that whole cities and counties might be military areas, much less to regulate civilian life in such places.

We submit that if the Act of March 21, 1942, can be construed as authorizing what was done by the military, it vested them with legislative authority without fixing any standards whatever for the action of the military. It is no answer to say that the areas were to be military areas, and that the action to be regulated would be such as would naturally relate to such areas. For the areas here fixed were not military areas in any real sense, the

---

[9] *Northern Pacific Co.* v. *North Dakota*, 250 U. S. 135; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163.

action taken was not such as would normally be taken with regard to military camps, forts, or other places where the military was actually functioning.

The government suggests (p. 70) that even if the law did delegate legislative powers, that is immaterial here because the President had power without Congressional action to do what was done. We have already shown that this last contention is without merit.

The Solicitor General suggested during the argument that the statute might be saved from condemnation by reading into it a provision limiting its application to "reasonable" military orders. It is difficult to see how that would save the statute. For it would still lay down no standards. Indeed the suggestion adds nothing to the statute, since it cannot be supposed that unreasonable orders would ever be valid ones. Moreover, how can a citizen know which orders are reasonable and which are not? If that change saves the statute from a charge of delegation it certainly makes it vulnerable on the score of uncertainty.

For no one can tell whether the order as applied to him is a reasonable military measure. That applies to the orders here in question and brings the statute under the rule announced by this Court when dealing with the war time Lever Act. For the Court held void for uncertainty that part of the statute which punished the exaction of any "unreasonable" price (*United States* v. *Cohen Grocery Company*, 255 U. S. 81).

The suggestion was also made during the argument that Executive Order 9066 imposes a limitation on the statute. This we respectfully submit is not so, nor, if so would it make any difference. In the first place, the statute is in no way limited; it does not prescribe a punishment only for disobedience of military orders issued under Executive Order 9066. In the second place, the Executive Order itself contains no standards, either as to the extent of the military areas, the classes of persons to be evacuated or the acts which might be regulated. If the Executive Order be con-

strued as applicable to the many thousands of square miles which General DeWitt on the West Coast and General Drum on the East Coast have declared to be military areas it gives such wide discretion to the military commanders to prescribe conditions under which civilians may "remain" in such areas that it is void.

Nor do the references in the order to espionage and sabotage save either the order or the statute. For there is no justification for vesting jurisdiction over such matters in the military, no suggestion, moreover, that the army issued its orders only against persons suspected of committing such offenses. Indeed, the Solicitor General, in effect, conceded that these references to espionage and sabotage did not establish standards, for he admitted, on questioning from the Court, that the Executive Order would not justify the removal of citizens of German ancestry from St. Louis merely because war plants and army camps were located in and near that city.

The truth of the matter is that no form of words, either in the statute, in the Executive Order or in the military orders, can avail in the absence of the required substance, namely, a declaration by Congress of legislative policy with regard to the evacuation of American citizens and the setting up of standards by which administrative action taken under such law could be tested. Nothing less complies with the command of the Constitution that it should be the Congress which is to legislate. And no running together of the various documents in this case constitutes any declaration of legislative policy or sets up any standards. In discussing this question, of course, we wish to remind the Court that we are assuming, but not admitting, that Congress might have power to order the deportation of citizens of a particular race without hearings and to entrust such deportation to the military authorities. These aspects of the case, however, have been discussed under other heads.

7. The Question of Vagueness

While the Government in its brief does not mention appellant's objection to the statute on the score of its vagueness, this subject is treated in the brief *amicus* filed by the States of California, Oregon and Washington (pp. 82, 83) and was discussed on the argument by the Solicitor General.

Both the Solicitor General and the three State Attorneys General rely on the provision of the statute which permits punishment only in case of knowledge of the existence and the extent of the orders and that the act complained of violated them. But such a provision cannot save this statute from condemnation on the ground of its vagueness since there is nothing in the statute from which a person can determine whether or not a particular order comes within its terms. When the Legislature appears to give carte blanche to an administrative agency, be it civil or military, the civilian acts with reference to orders of that agency at his peril. The fact that he cannot be convicted unless it is proved that he had knowledge of the orders issued by the agency helps him not at all.

For instance, in this particular situation how was any person to know whether the military were authorized to impose curfew orders? There is nothing in the statute other than the words "any acts" which can be construed to authorize the imposition of the curfew. Moreover, suppose the military had issued orders prohibiting certain citizens from exercising particular callings, or holding meetings? Would such orders have been authorized by the law? And how could the citizen possibly know? Indeed, the curfew order, Proclamation No. 3, includes a prohibition against traveling more than five miles from home at any time. What is the authority for such a restriction on the freedom of civilians?

We submit that neither the precision of the military orders or the requirement of knowledge of the orders are

of any consequence. A citizen is entitled to know whether administrative orders are authorized by law. That he cannot know unless the law itself is clear and definite.

Moreover, even the military orders themselves are vague when they relate to persons of "Japanese ancestry" without in any way defining that term. Did the military authorities intend to include only persons who were full blooded Japanese? And if they intended also to include persons descended from mixed marriages, how far back was the taint to run? Was it the intention of the military authorities to adopt the scheme of Nazi Germany's Nuremberg Laws against Jews, which classify as a Jew anyone who had a single grandparent who was Jewish? These are but some of the questions which present themselves in connection with the vague definition contained in the military orders.

How, under all these circumstances, could a person know what he was to do?

8. Appellant Has Standing to Raise the Constitutional Issues

The government argues (pp. 71-81) that since appellant was never detained in a camp he has no standing to question the constitutionality of the detention of other persons. However, appellant is not questioning such detention. He questions the military orders which imposed upon him the obligation to remain in his home at night, and within five miles of it during the day, and the obligation to report for the purpose of being evacuated. All of the discussion in this part of the brief would appear to be wholly irrelevant.

So it is also irrelevant that had appellant submitted to the illegal orders he might thereafter have been released from detention. This is all the more so since at the time the particular exclusion order of May 10th was issued

no provision had been made for the release of American citizens from detention. For the first order which contemplated authorization to leave the camps was made on June 27, 1942 (see brief, p. 77, footnote 77). The regulations with regard to the issuance of leaves were not issued until September 26, 1942 (p. 78, footnote 78). The first count of the indictment charged appellant with having failed to obey the order of evacuation on May 11, 1942 (R. 1, 2). Moreover, none of this discussion about camps would have any bearing whatever on the conviction for refusing to obey the curfew orders.

We submit, therefore, that it is wholly irrelevant that subsequent to the indictment appellant might have been released from camp had he first submitted himself to the illegal orders. In view of the fact that at the time when the orders were issued they contained no provision for release, there is not the slightest basis for the government's contention that appellant cannot challenge the constitutionality of the orders he is charged with having violated.

Conclusion

Before leaving this case with the Court, we wish to deal briefly with certain questions asked by members of the Court during the argument with regard to the Court's power to review military decisions. It was suggested that our position might subject all military decisions to judicial scrutiny. We do not so contend, nor do we believe that there is any difficulty in drawing a line of demarcation. We submit that whenever the military authorities interfere with the rights of civilians (be they citizens or friendly aliens) the Courts will scrutinize their acts in order to determine whether the claim of military necessity advanced by the military actually rested on considerations "immediate and impending" or whether the military acted on grounds "remote or contingent"—see *Mitchell* v. *Harmony*,

13 How. 115, 133, 134. In the former case the military decision will be accepted; in the latter it must be rejected. It is clear, therefore, that military decisions unrelated to the freedom of motion of civilians or the control of their property will not be subject to judicial scrutiny, but even these will be subject to judicial revision only where no actual military action was involved. We believe that this distinction, which has never heretofore been rejected by this Court, leaves ample room for the proper functioning of the military, while at the same time protecting civilians from despotic interference with their liberties.

We submit, moreover, that from the facts in this case the military acted on considerations that were remote and contingent. It was, no doubt, evident to the government for many years that war with Japan might take place. Its inevitability must have been plain no later than October or November, 1941. Yet the army had no plan for the evacuation of the Japanese population, nor did this appear to be necessary even after Pearl Harbor. The evacuation was not ordered until after various groups on the West Coast and the Congressional representatives for the Pacific states had brought pressure to bear on the President. The Court cannot ignore these undisputed facts in considering the claim of military necessity. The very fact that evacuation was spread over a period of nearly four months (from March 24th to July 22nd, see Government's brief, pp. 74-76) shows the absence of any immediate or imminent threat to the West Coast. The fact of the matter is that the military believed the measures justifiable in order to avoid espionage and sabotage. We submit that they have no authority to deal with such matters, except, of course, while conflict is raging or where the persons involved have come through military lines and are, therefore, subject to military law as decided by this Court in *Ex Parte Quirin*, 317 U. S. 1.

It is therefore respectfully submitted that the arguments advanced by the government are without merit and the conviction should be reversed.

Respectfully submitted,

FRANK L. WALTERS,
HAROLD EVANS,
OSMOND K. FRAENKEL,
Counsel for Appellant.

ARTHUR G. BARNETT,
of Seattle, Wash.

EDWIN M. BORCHARD,
of New Haven, Conn.

HAROLD EVANS,
of Philadelphia, Pa.

BRIEN MCMAHON,
of Washington, D. C.

OSMOND K. FRAENKEL,
of New York, N. Y.

WILLIAM DRAPER LEWIS,
of Philadelphia, Pa.

FRANK L. WALTERS,
of Seattle, Wash.

of Counsel.

APPENDIX

Extracts from San Francisco News, April 13, 1943, pp. 1, 3

DeWitt Hits Coast Japs

Charges of a movement to bring American-born Japanese back to the Pacific Coast were made today by Lieut. Gen. DeWitt, commanding general of the Western Defense Command and Fourth Army, at a House naval affairs subcommittee hearing here. He said he would oppose this movement "with every effort and means at my disposal."

"I don't want any Jap back on the Coast," said General DeWitt, after informing the committee of "a feeling developing in certain sections and among certain elements" to bring these American-Japanese back to the Coast military area.

"There is no way to determine their loyalty," he declared. "This West Coast is too vulnerable. I am opposing this movement with every effort and means at my disposal.

"I have two problems—defending this Coast against espionage and sabotage by the Japs and driving them off the face of the map in the Aleutians.

"It makes no difference whether the Japanese is theoretically a citizen—he is still a Japanese. Giving him a piece of paper won't change him.

"I don't care what they do with the Japs as long as they don't send them back here. A Jap is a Jap." • • •

Rep. John Z. Anderson of the Eighth Congressional District said he had received protests from his constituents concerning the War Department's policy of allowing Japanese-Americans to serve in the Army.

'We'll Bury Them'

"We shipped 9000 Japanese out of my district—if any of them are sent back we'll bury them," Rep. Anderson said.

Rep. Izac assured General DeWitt the entire California congressional delegation is "closely watching the situation

in Washington. There won't be any Japanese sent back here."

"Wait and see," General DeWitt said, smiling grimly.

Extracts From Ex Parte Milligan

"By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people."

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

"It is claimed that martial law covers with its broad mantle the proceedings of this Military Commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the

country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish."

These portions of the *Milligan* case have often been cited with approval by this Court. The following is but a partial list of the cases:

Hamilton v. *Kentucky Distilleries Company*, 251 U. S. 146, 156 (Justice Brandeis)

United States v. *Cohen Grocery Company*, 255 U. S. 81, 88 (Chief Justice White)

Sterling v. *Constantin*, 287 U. S. 378, 402 (Chief Justice Hughes—with an extensive quotation)

Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398, 426 (Chief Justice Hughes)

Schechter Poultry Company v. *United States*, 295 U. S. 495, 528 (Chief Justice Hughes).